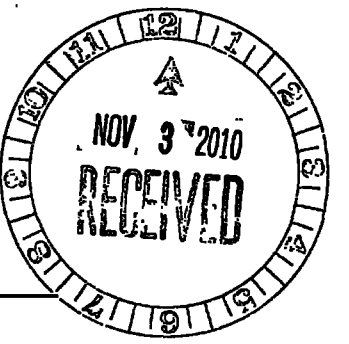

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 35436

DUNCAN SMITH AND GERALD ALTIZER
CONTINUANCE-IN-CONTROL
EIGHTEEN THIRTY GROUP, LLC
AND GEORGES CREEK RAILWAY, LLC

VERIFIED NOTICE OF EXEMPTION

COMMENTS OF JAMES RIFFIN

228124

1. **Notice is hereby given that James Riffin ("Riffin"), intends to participate as a party of record in this proceeding.** Please direct all matters pertaining to this proceeding to: James Riffin; 1941 Greenspring Drive; Timonium, MD 21093. Telephone No.: (443) 414-6210

2. On October 19, 2010, Duncan Smith and Gerald Altizer, who identified themselves as the "Petitioners" in the above entitled proceeding, (**"Petitioners" or "Smith" or "Altizer"**), filed a Verified Notice of Exemption (**"NOE"**) asking the Surface Transportation Board ("Board") to grant the **Petitioners** an exemption from the requirements of 49 CFR 1180.

3. **Riffin objects to the NOE for the following reasons:**

4. The Board has held in numerous proceedings, including every proceeding in which Riffin has filed a NOE, that if a proceeding is controversial, or becomes controversial, a NOE is inappropriate, for the time constraints associated with a NOE do not permit the development of a sufficient record.

5. Riffin will be involved in this proceeding. This proceeding will become (it already has become) highly controversial. Permitting this NOE to move forward would implicate

Constitutional Equal Protection of the Laws concerns, and would implicate *New York Cross Harbor R.R. v. Surface Transp.*, 374 F.3d 1177, 1181(D.C. Cir. 2004), concerns.

6. NOE's which contain material misrepresentations are void *ab initio.*

7. The NOE contains the following material misrepresentations:

A. The first paragraph states that Duncan Smith and Gerald Altizer are the Petitioners. In the body of the NOE, the Petitioners represent that Eighteen Thirty Group LLC and Georges Creek Railway LLC will be the carriers. If Eighteen Thirty Group LLC and Georges Creek Railway LLC will be the carriers, then these two legal entities should be the 'petitioners,' not Mssrs. Smith and Altizer.

B. The Petitioners, in ¶7, represent that the proposed continuance-in-control "is not part of a series of anticipated transactions that would connect the railroads with each other."

a. Eighteen Thirty Group and Georges Creek Railway propose to be common carriers on the same line of railroad. That is 'connected.'

b. Georges Creek Railway presently operates in Luke, MD, a few short miles from the southern end of the Line Eighteen Thirty Group and Georges Creek Railway propose to acquire. Mr. Altizer has made it abundantly clear over the years that he has a desire to acquire and operate the line that connects Luke / Westernport, MD with Morrison, MD. On information and belief, Riffin believes that Mr. Altizer has, within the past few years, asked CSX if CSX will sell to Mr. Altizer that segment of the Georges Creek Branch that connects Luke / Westernport with Morrison. Since CSX has made it known that it no longer desires to operate on the segment of the Georges Creek Branch that connects Morrison with Westernport / Luke, Riffin believes that Eighteen Thirty Group and Georges Creek Railway are 'anticipating' acquiring the Segment that connects Morrison with Westernport / Luke.

C. The Petitioners assert in ¶12 that this "proceeding is exempt from environmental review under 49 CFR §1105.6(c)(2)(i) because the proposed action will not cause any operating changes that exceed the threshold established in 49 C.F.R. §1105.7(e)(4) or (5)."

a. In ¶11, the Petitioners assert that this proceeding is related to three other proceedings currently before the Board, including Docket No. AB-55 (Sub-No. 659X).

b. In the Petition for Exemption the Eighteen Thirty Group, LLC filed in AB-55 (Sub-No. 659X), on p. 8, Eighteen Thirty Group avers "that the Line would restore service to about 10 initial customers generating about 450-500 cars per year of freight ... ."

c. In ¶4 of this proceeding, the Petitioners aver that the line is "about 8.54" long.

d. Dividing 450 cars per year by 8.54 miles of line equates to **52.69 carloads per mile per year.**

e. 49 C.F.R. §1105.7(e)(4)(iv) states:

> (iv) "If the proposed action will cause diversions from rail to motor carriage of more than:
> (A) 1,000 rail carloads a year; **OR**
> (B) **An average of 50 rail carloads per mile per year for any part of the affected line,** quantify the resulting net change in energy consumption and show the date and methodology used to arrive at the figure given.

f. 49 CFR §1105.7(e)(5) states:

> "(5) (i) If the proposed action will result in either:
> "(A) An increase in rail traffic of at least 100 percent (measured in gross ton miles annually) or an increase of at least eight trains a day on any segment of rail line affected by the proposal, or
> (B) an increase in rail yard activity of at least 100 percent (measured by carload activity),
> (C) ... quantify the anticipated effect on air emissions. For a proposal under 49 U.S.C. 10901 (or 10505) to construct a new line or reinstitute service over a previously abandoned line, only the eight train a day provision in subsection (5)(i)(A) will apply.

g. There has been no rail traffic over the 8.54 miles of Line the Petitioners propose to acquire and operate for more than four years. Consequently, what Petitioners propose to do

represents far more than a 100 percent increase in rail traffic not only on the Line, but also in rail yard activity. Since the Line has never been 'abandoned,' the 8 trains-per-day exception would not apply.

h. It was a material misrepresentation for the Petitioners to aver that this proceeding was exempt from the environmental requirements of 49 CFR 1105.

D. On p.7 of the NOE, in the "purpose to be accomplished by the transaction" paragraph, the Petitioners aver:

> "The purpose of this common control is to enable the investor [Mr. Smith] to finance this acquisition venture **secured by an interest in the track and right of way** ... ."

a. In the 'related proceedings,' the Petitioners aver that this Line is a part of the bankruptcy estate of Riffin.

b. The Petitioners are fully aware of Riffin's bankruptcy proceeding, including Riffin's Schedules of Real and Personal property, and Exemptions. The Petitioners and their attorney, are also fully aware that CSX deeded the Line to WMS L.L.C., a Maryland limited liability company, that WMS L.L.C. has not filed for bankruptcy, that Riffin has conveyed 96% of his interest in the track material and right-of-way to other parties prior to his filing for bankruptcy, and that the only thing that is / was a part of Riffin's bankruptcy estate was the 4% interest Riffin retained in the track material and right-of-way. The Petitioners are also fully aware that the only thing that is in Riffin's bankruptcy estate is his 4% interest in WMS L.L.C., and thus the only thing that potentially can be conveyed by Riffin's bankruptcy trustee is Riffin's 4% interest in WMS LLC, **not** the "track and right of way." The Petitioners are also fully aware that Riffin has exempted his 4% interest in WMS LLC, and thus Riffin's 4% interest is no longer a part of Riffin's bankruptcy estate.

c. It was a material misrepresentation for the Petitioners not to disclose the infirmities associated with title to the Line, and for the Petitioners to represent that Mr. Smith's investment would be "secured by an interest in the track and right of way."

d. It was a material misrepresentation for the Petitioners to represent that Riffin's bankruptcy trustee could convey the common carrier obligations associated with the Line. As the Board is fully aware, Riffin filed for bankruptcy under Chapter 7. §109(b)(1) of the Bankruptcy Code explicitly states that a railroad cannot file for bankruptcy protection under Chapter 7. If Riffin has the common carrier obligations associated with the Line, then Riffin is prohibited from filing for Chapter 7 bankruptcy. The only reason Riffin's bankruptcy proceeding has been permitted to proceed, is because the Board has held that Riffin did not have 'suitable legal interest' in the Line to be the common carrier on the Line. If the Board were to grant this NOE, the Board would tacitly be admitting that Riffin does in fact have, and has had, the common carrier obligations associated with the Line. And the moment that the Board admits that Riffin has the common carrier obligations associated with the Line, Riffin's bankruptcy proceeding will have to be dismissed. And if Riffin's bankruptcy proceeding is dismissed due to Riffin being a railroad *ab initio*, there will no longer be a Riffin's Bankruptcy Estate or Trustee.

E. Mr. Heffner misrepresented to the Board that he can represent Mssrs. Smith and Altizer, and the Eighteen Thirty Group LLC and Georges Creek Railway LLC.

a. Mr. Heffner was the counsel of record for Western Maryland Services LLC, a West Virginia limited liability company, 98% of which was owned by Riffin; for WMS LLC, a Maryland limited liability company, 100% of which was owned by Riffin; and for James Riffin, in the AB 55 (Sub-No. 659X) proceeding.

b. Riffin paid Mr. Heffner's retainer fee and other legal fees.

c. 49 CFR 1103.16(b) states:

> "(b) It is unethical for a practitioner to represent conflicting interests, except by express consent of all concerned given after a full disclosure of the facts. Within the meaning of this section, a practitioner represents conflicting interest, when on behalf of one client, it is his duty to contend for that which duty to another client requires him to oppose.
>
> (c) The obligation to represent the client with undivided fidelity and not to divulge secrets or confidence forbids also the subsequent acceptance of retainers or employment from others in matters adversely affecting any interest of the client with respect to which confidence has been reposed."

d. The parties Mr. Heffner is attempting to represent, have a desire to divest Riffin of his common carrier obligations in the Line, and to divest Riffin and parties Riffin has contracted with, of his and their title and interest to the track material and right-of-way associated with the Line.

e. There is a high probability that Mr. Heffner will be called as a witness in an adversary proceeding in Riffin's bankruptcy proceeding. Were Mr. Heffner to represent the parties in this proceeding, he could potentially invoke attorney / client privilege to refuse to testify, or to respond to discovery requests. He also could potentially disclose privileged information to those parties, whose interests are adverse to Riffin's interests.

f. Riffin, WMS LLC and Western Maryland Services have not given their consent for Mr. Heffner to represent Mssrs. Smith, Altizer, the Eighteen Thirty Group LLC or Georges Creek Railway LLC., nor will they grant such consent.

8. WHEREFORE, for the foregoing reasons, Riffin prays that the Board:

A. Reject the NOE, as controversial;

B. Deny the NOE;

C. Order Mr. Heffner to cease representing Mssrs. Smith, Altizer, the Eighteen Thirty Group LLC and Georges Creek Railway LLC, in any matter that relates in any way to Riffin, to WMS LLC, to Western Maryland Services LLC, or to the Line of railroad involved in the AB 55 (Sub-No. 659X) proceeding.

Respectfully,

James Riffin
1941 Greenspring Drive
Timonium, MD 21093
(443) 414-6210

CERTIFICATE OF SERVICE

I hereby certify that on the 3rd Day of November, 2010, a copy of the foregoing Comments of James Riffin were mailed via first class mail, postage prepaid, to: John Heffner, Ste 200, 1750 K Street NW, Washington, DC 20006 (202) 296-3333; and was hand delivered or mailed to the U.S. Trustee, 2nd Floor, 101 W. Lombard St., Baltimore, MD 21201; to Duncan Smith, 10706 Beaver Dam Road, Cockeysville, MD 21030; and to Mark Friedman, DLA Piper, 6225 Smith Ave, Baltimore, MD 21209.

James Riffin